

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
RENO, NEVADA

7 DAVID D. MOON,	)	3:09-CV-00298-ECR-VPC
	)	
8 Plaintiff,	)	
	)	
9 vs.	)	<b><u>Order</u></b>
	)	
10 COUNTRYWIDE HOME LOANS, INC.;	)	
BANK OF AMERICA; MORTGAGE	)	
11 ELECTRONIC REGISTRATIONS	)	
SYSTEM, INC.; RECONTRUST COMPANY,	)	
12 INC.; "MERS",	)	
	)	
13 Defendants.	)	
	)	

15 Plaintiff in this case is the owner of a home in Sparks,  
16 Nevada. Defendants are Countrywide Home Loans, Inc., Bank of  
17 America, Mortgage Electronic Registration Systems, Inc. and  
18 Recontrust Company, Inc. Now pending is Defendants' "Motion to  
19 Dismiss First Amended Complaint" (#18). Plaintiff opposed (#24) the  
20 motion, and Defendants replied (#26). The motion is ripe, and we  
21 now rule on it.

**I. Factual and Procedural Background**

24 On March 16, 2006, Plaintiff purchased a home using borrowed  
25 funds. (Am. Compl. at 3-4 (#17).) On March 22, 2007, Plaintiff  
26 received a "Notice of Trustee Sale." (Am. Compl. at 8 (#17).)<sup>1</sup> On

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28 <sup>1</sup> We provide few background facts in this Order because the Amended Complaint in this case contains almost no factual allegations.

1 May 14, 2009, Plaintiff filed a complaint in Nevada state court. On  
2 June 4, 2009, that case was removed (#1) to our Court. On June 4,  
3 2009, Plaintiff filed a Motion for Preliminary Injunction (#3). On  
4 June 29, 2009, Defendants filed a Motion to Dismiss (#7). On July  
5 17, 2009, Plaintiff filed a "Motion to Extend Time regarding  
6 Discovery/Non-Dispositive matter to File Amended Complaint" (#12).  
7 On July 28, 2009, Defendants filed a Motion to Strike (#13)  
8 Plaintiff's "Motion to Extend Time regarding discovery/non  
9 dispositive matter to file amended complaint" (#12).

10 On July 29, 2009, we denied Defendants' Motion to Strike (#13)  
11 and Defendants' Motion to Dismiss (#7) and granted Plaintiff's  
12 "Motion to Extend Time regarding discovery/non dispositive matter to  
13 file amended complaint" (#12). (Minute Order (#16).) In our Order  
14 (#16), we noted that though Defendants had stated several valid  
15 grounds in support of their Motion to Strike, Plaintiff was  
16 appearing pro se, and therefore should be given latitude and  
17 permitted to file an amended complaint. We did, however, permit  
18 Defendants to renew their Motion to Dismiss (#7) after Plaintiff  
19 filed an amended complaint, if appropriate. (Minute Order (#16).)

20 On August 26, 2009, Plaintiff filed an Amended Complaint (#17).  
21 On September 23, 2009, Defendants filed a Motion to Dismiss (#18).  
22 On November 20, 2009, Plaintiff opposed (#24) the motion. On  
23 December 7, 2009, Defendants replied (#26). On December 22, 2009,  
24 Plaintiff filed a "Motion to Quash all Defendant's [sic] Pleadings  
25 etc. and grant Plaintiff Summary Judgment for Defendant's [sic] and  
26 Defendant's [Sic] Attorneys Failure to Appear Pursuant to F.R.C.P.  
27 1, 5.1, 11, 17A, and Others." (#27)

## II. Motion to Dismiss Standard

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) will only be granted if the complaint fails to "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). On a motion to dismiss, "we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889 (1990)) (alteration in original). Moreover, "[a]ll allegations of material fact in the complaint are taken as true and construed in the light most favorable to the non-moving party." In re Stac Elecs. Sec. Litig., 89 F.3d 1399, 1403 (9th Cir. 1996) (citation omitted).

Although courts generally assume the facts alleged are true, courts do not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Accordingly, "[c]onclusory allegations and unwarranted inferences are insufficient to defeat a motion to dismiss." In re Stac Elecs., 89 F.3d at 1403 (citation omitted).

Review on a motion pursuant to Fed. R. Civ. P. 12(b)(6) is normally limited to the complaint itself. See Lee v. City of L.A., 250 F.3d 668, 688 (9th Cir. 2001). If the district court relies on materials outside the pleadings in making its ruling, it must treat the motion to dismiss as one for summary judgment and give the non-moving party an opportunity to respond. Fed. R. Civ. P. 12(d); see United States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003). "A

1 court may, however, consider certain materials – documents attached  
2 to the complaint, documents incorporated by reference in the  
3 complaint, or matters of judicial notice – without converting the  
4 motion to dismiss into a motion for summary judgment.” Ritchie, 342  
5 F.3d at 908.

6 If documents are physically attached to the complaint, then a  
7 court may consider them if their “authenticity is not contested” and  
8 “the plaintiff’s complaint necessarily relies on them.” Lee, 250  
9 F.3d at 688 (citation, internal quotations, and ellipsis omitted).  
10 A court may also treat certain documents as incorporated by  
11 reference into the plaintiff’s complaint if the complaint “refers  
12 extensively to the document or the document forms the basis of the  
13 plaintiff’s claim.” Ritchie, 342 F.3d at 908. Finally, if  
14 adjudicative facts or matters of public record meet the requirements  
15 of Fed. R. Evid. 201, a court may judicially notice them in deciding  
16 a motion to dismiss. Id. at 909; see Fed. R. Evid. 201(b) (“A  
17 judicially noticed fact must be one not subject to reasonable  
18 dispute in that it is either (1) generally known within the  
19 territorial jurisdiction of the trial court or (2) capable of  
20 accurate and ready determination by resort to sources whose accuracy  
21 cannot reasonably be questioned.”).

### 22 III. Analysis

#### 23 A. National Currency Act

24 The first claim in Plaintiff’s Complaint is entitled “Violated  
25 the National Currency Act.” Plaintiff appears to quote sections 26  
27 and 53 of the National Currency Act.

1       The National Currency Act of 1863 and the National Bank Act of  
2 1864 provided "for federal chartering of national banks." Clarke v.  
3 Sec. Indus. Ass'n, 479 U.S. 388, 410-11 (1987). The National  
4 Currency Act "authorized the formation of national  
5 banks . . . . It prohibited any transfer of bank assets in  
6 contemplation of insolvency or with a view to preferring one  
7 creditor of the bank over another." Third Nat. Bank in Nashville v.  
8 Impac Ltd., Inc., 432 U.S. 312, 316 (1977).

9       Plaintiff's Amended Complaint lacks any factual allegations  
10 that could support a National Currency Act violation. Indeed, this  
11 claim contains no factual allegations whatsoever. It will therefore  
12 be dismissed.

13       B. Lack of Standing

14       Plaintiff's second claim is entitled "Lack of Standing  
15 Defendant is not Holder in Due Course." The claim alleges  
16 "defendant does not possess the original promissory note and has no  
17 standing to foreclose." (Am. Compl. at 10 (#17).)

18       Defendants correctly note that Nevada law does not require  
19 production of the original promissory note prior to non-judicial  
20 foreclosure. The procedure for conducting a trustee's foreclosure  
21 sale in Nevada is set forth in Nev. Rev. Stat. § 107.080. The  
22 foreclosure process is commenced by the recording of a notice of  
23 breach and election to sell by the beneficiary, the successor in  
24 interest of the beneficiary, or the trustee. NEV. REV. STAT. §  
25 107.080(2)(b)(2007). After the notice of default is recorded, three  
26 months must elapse. Id. § 107.080(2)(c). Then, the trustee or  
27 other person authorized to make the sale must give notice of the

1 time and place of sale. Id. § 107.080(4). A sale is conducted, and  
2 after the sale a trustee's deed is issued. Nevada's foreclosure  
3 statute, which is comprehensive, does not require production of the  
4 original promissory note. In the absence of any legislative  
5 guidance, we decline to create such a requirement. Plaintiff's  
6 second claim will therefore be dismissed.

7 C. Fraud

8 Plaintiff's third claim is entitled "Fraudulent Concealment  
9 Misrepresentation No Loan Ever Existed." The claim alleges, inter  
10 alia, that "the loan does not exist" and "the note has been  
11 satisfied in full by third-party payment." (Am. Compl. at 16-17  
12 (#1).)

13 Rule 9(b) of the Federal Rules of Civil Procedure requires that  
14 "[i]n alleging fraud or mistake, a party must state with  
15 particularity the circumstances constituting fraud or mistake."  
16 FED. R. CIV. P. 9(b). A pleading is sufficient under Rule 9(b) if it  
17 identifies the circumstances constituting fraud so that the  
18 defendant can prepare an adequate answer from the allegations. See  
19 Neubronner v. Milken, 6 F.3d 666, 671 (9th Cir. 1993). In addition,  
20 allegations of fraud must be accompanied by "the who, what, when,  
21 where, and how of the misconduct charged." Vess v. Ciba-Geigy Corp.  
22 USA, 317 F.3d 1097, 1106 (9th Cir. 2003). Plaintiff's Amended  
23 Complaint does not allege fraud or misrepresentation with sufficient  
24 particularity so as to comply with Rule 9(b). Moreover, the factual  
25 allegations asserted under this claim are stated with such a lack of  
26 clarity that they fail to give adequate notice to Defendants of the  
27 allegations against them. For example, Plaintiff alleges that "the  
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1 note is not evidence of a loan. Since the above-described note  
2 states that the referenced loan was an event that had allegedly  
3 occurred at some unspecified date in the past, propr to the date the  
4 above-described note was signed." (Am. Compl. at 14 (#17).)  
5 Plaintiff's third claim for relief thus cannot survive a motion to  
6 dismiss.

7 D. Elements of a Deed of Trust

8 Plaintiff's fourth claim is entitled "Elements of a Deed of  
9 Trust." The factual allegations underlying the claim are difficult  
10 to comprehend. The gravamen of this claim seems to be that the  
11 contract between Plaintiff and Defendants was unconscionable because  
12 "lenders, escrow companies, trustees, and the beneficiary's accept  
13 these agreements beings they are not honest or fair." (Am. Compl.  
14 at 18 (#1).) This allegation, even if true, cannot form the basis  
15 of any actionable claim. Plaintiff's fourth claim will thus be  
16 dismissed.

17 E. UCC Applicable to a Mortgage

18 Plaintiff's fifth claim is entitled "UCC applicable to a  
19 mortgage." In this claim, Plaintiff cites various sections of the  
20 Uniform Commercial Code ("UCC"), and argues that he is the  
21 "entitlement holder" under UCC 8-102(7), which generates an  
22 "entitlement order" under UCC 8-102.

23 The UCC defines "Entitlement order" as "a notification  
24 communicated to a securities intermediary directing transfer or  
25 redemption of a financial asset to which the entitlement holder has  
26 a security entitlement." U.C.C. § 8-102(8). "Entitlement holder"  
27 means "a person identified in the records of a securities  
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1 intermediary as the person having a security entitlement against the  
2 securities intermediary. If a person acquires a security  
3 entitlement by virtue of Section 8-501(b)(2) or (3), that person is  
4 the entitlement holder." U.C.C. § 8-102(7). Plaintiff pleads no  
5 facts that could plausibly support this claim. Therefore, this  
6 claim will be dismissed.

7 F. Altering a Negotiable Instrument

8 Plaintiff's sixth claim is entitled "Altering a Negotiable  
9 Instrument." Plaintiff alleges, inter alia, that "Defendants  
10 illegally sold Plaintiff's unregistered instrument. Plaintiff  
11 alleges and believes deeds of trust and mortgage deeds are always  
12 registered as evidences of debts . . . notes are never  
13 registered . . . selling un-registered securities is an automatic  
14 right of rescission of the original contract. Plaintiff alleges and  
15 believes plaintiff possesses entitlement rights and possessory  
16 rights to Plaintiff's original note . . . it is negotiable." (Am.  
17 Compl. at 21 (#17))(ellipses in original). The remainder of the  
18 allegations underlying this claim are also difficult to understand.  
19 Plaintiff additionally quotes large sections of Nev. Rev. Stat.  
20 § 90.605, which deals with the offering of false evidence and  
21 destruction of evidence. The allegations underlying this claim are  
22 too convoluted and vague to demonstrate an entitlement to relief,  
23 let alone provide Defendants with fair notice. Plaintiff's sixth  
24 claim for relief will therefore be dismissed.

25 G. Qualified Written Request

26 Plaintiff's seventh claim for relief is entitled "Qualified  
27 Written Request." Plaintiff alleges that he "mailed a Qualified  
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1 Written Request asking for all documents and disclosure of  
2 Countrywide's transaction on March 2, 2009 and as of the filing of  
3 this First Amended Complaint, Defendant has not responded within the  
4 sixty day response under law." (Am. Compl. at 23 (#17).)

5 This claim for relief appears to allege a violation of the Real  
6 Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2601-2617.  
7 RESPA requires that "[i]f any servicer of a federally related  
8 mortgage loan receives a qualified written request from the borrower  
9 (or an agent of the borrower) for information relating to the  
10 servicing of such loan, the servicer shall provide a written  
11 response acknowledging receipt of the correspondence within 20  
12 days . . . unless the action requested is taken within such period."  
13 12 U.S.C. § 2605(e)(1)(A). RESPA defines a qualified written  
14 request as:

15 a written correspondence, other than notice on a payment  
16 coupon or other payment medium supplied by the servicer,  
that –

17 (i) includes, or otherwise enables the servicer to  
18 identify, the name and account of the borrower; and  
19 (ii) includes a statement of the reasons for the belief of  
20 the borrower, to the extent applicable, that the account  
is in error or provides sufficient detail to the servicer  
regarding other information sought by the borrower.

21 12 U.S.C. § 2605(e)(1)(B)

22 Plaintiff attached his alleged qualified written request to the  
23 Amended Complaint. Though in the body of Plaintiff's Complaint,  
24 Plaintiff claims that he sent a qualified written request to  
25 Countrywide, (See Am. Compl. at 8 (#17)), it appears that the  
26 alleged qualified written request is a letter sent to Recontrust  
27 Property. The letter contains over one hundred questions and  
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1 demands for information ranging from "Please tell me how property  
2 inspections are beneficial to me?" to "Do you consider the payment  
3 of inspection fees as a cost of collection? Yes or no?" to "Please  
4 explain to me your policy on forced-placed insurance." (See Am.  
5 Compl. Ex. B (#17).) The letter requests an enormous amount of  
6 information, and is more akin to a discovery demand than a qualified  
7 written request.

8       Nevertheless, Plaintiff's claim fails for other reasons:  
9 Plaintiff fails to allege that Recontrust is a "servicer" within the  
10 meaning of RESPA and Plaintiff fails to allege he suffered any  
11 pecuniary loss as a result of the alleged RESPA violation.  
12 "Servicer" is defined in the statute as "the person responsible for  
13 servicing of a loan (including the person who makes or holds a loan  
14 if such person also services the loan)." 12 U.S.C. § 2605(i)(2).  
15 Plaintiff's Amended Complaint contains no factual allegations that  
16 would support the notion that Recontrust is the servicer of  
17 Plaintiff's loans. Indeed the allegations suggest that Countryside  
18 was the servicer of Plaintiff's loans. In addition, Plaintiff does  
19 not allege that he suffered any damage as a result of this alleged  
20 RESPA violation. Even if Recontrust was the servicer of Plaintiff's  
21 loan and failed to respond to a qualified written request, such  
22 failure alone does not substantiate a RESPA claim. Plaintiff must  
23 have also suffered pecuniary loss to support a RESPA violation. See  
24 12 U.S.C. § 2605(f)(1)(A) ("Whoever fails to comply with this  
25 section shall be liable to the borrower ... [for] any actual damages  
26 to the borrower as a result of the failure ..."); Hutchinson v. Del.  
27 Sav. Bank FSB, 410 F. Supp. 2d 374, 383 (D. N.J. 2006) ("However,

1 alleging a breach of RESPA duties alone does not state a claim under  
2 RESPA. Plaintiffs must, at a minimum, also allege that the breach  
3 resulted in actual damages."); Lal v. American Home Servicing, Inc.,  
4 ---- F. Supp. 2d ----, No. 2:09-cv-01585-MCE-DAD, 2010 WL 225524, at  
5 \*4 (E.D. Cal. Jan. 19, 2010) (dismissing RESPA claim because  
6 Plaintiff failed to plead pecuniary loss as a result of the alleged  
7 RESPA violation). Plaintiff's RESPA claim fails, and will be  
8 dismissed.

#### 9 10 IV. Leave to Amend

11 Under Rule 15(a) leave to amend is to be "freely given when  
12 justice so requires." In general, amendment should be allowed with  
13 "extreme liberality." Owens v. Kaiser Found. Health Plan, Inc., 244  
14 F.3d 708, 712 (9th Cir. 2001) (quoting Morongo Band of Mission  
15 Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990)). If factors  
16 such as undue delay, bad faith, dilatory motive, undue prejudice or  
17 futility of amendment are present, leave to amend may properly be  
18 denied in the district court's discretion. Eminence Capital, LLC v.  
19 Aspeon, Inc., 316 F.3d 1048, 1051-52 (9th Cir. 2003).

20 We have already given Plaintiff leave to amend his Complaint  
21 once. His Amended Complaint (#17) is fatally deficient. Though we  
22 are aware that Plaintiff is appearing pro se, and understand how  
23 daunting it can be to attempt to navigate our legal system without  
24 the assistance of an attorney, we will not grant Plaintiff leave to  
25 amend his Amended Complaint because granting leave to amend would  
26 likely be futile. After carefully analyzing Plaintiff's Amended  
27 Complaint (#17) and opposition (#24) to the present motion, we can  
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1 discern no facts that could potentially support a claim for relief.  
2 Leave to amend will therefore be denied.

3

4

**V. Conclusion**

5 Plaintiff has failed to state a claim upon which relief could  
6 be granted. Because we have already given Plaintiff one opportunity  
7 to amend his complaint, and he has still failed to state a single  
8 plausible claim for relief, we conclude that further leave to amend  
9 would be futile.

10

11 **IT IS, THEREFORE, HEREBY ORDERED THAT** Defendants' "Motion to Dismiss  
12 First Amended Complaint" (#18) is **GRANTED**.

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14 **IT IS FURTHER ORDERED THAT** Plaintiff's "Motion to Quash all  
15 Defendant's [sic] Pleadings etc. and grant Plaintiff Summary  
16 Judgment for Defendant's [sic] and Defendant's Attorneys Failure to  
17 Appear Pursuant to F.R.C.P. 1, 5.1, 11, 17A, and Others" (#27) is  
18 **DENIED** as moot.

19

20 The Clerk shall enter judgment accordingly.

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22 DATED: February 9, 2010.

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UNITED STATES DISTRICT JUDGE

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